In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 1448

THE KLAGES COAL AND ICE COMPANY,
d/b/a ROYAL CROWN BOTTLING COMPANY, PETITIONER

v.

JAMES D. HODGSON, SECRETARY OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1A-16A) is reported at 435 F.2d 377. The opinion of the district court (Pet. App. 17A-28A) is not officially reported.

JURISDICTION

The judgment of the court of appeals was entered on December 10, 1970. The petition for a writ of certiorari was filed on March 8, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the court of appeals correctly ruled that petitioner was not exempt under the Fair Labor Standards Act from paying its routemen overtime since it failed to prove that the routemen were outside salesmen under Section 13(a)(1) of the Act.

STATUTE AND REGULATIONS INVOLVED

Section 13(a)(1) of the Fair Labor Standards Act of 1938, 52 Stat. 1060, as amended, 29 U.S.C. 201, *et seq.*, as well as the pertinent regulation and administrative interpretations (29 C.F.R. 541.500, 541.505), are set forth at Pet. App. 29A-44A.

STATEMENT

The Secretary of Labor brought this suit under Section 17 of the Fair Labor Standards Act, 29 U.S.C. 217, to restrain petitioner from violating Section 7 of the Act, 29 U.S.C. 207 (Pet. App. 29A) by refusing to pay overtime compensation allegedly due certain employees. Petitioner contended that the employees in question were exempted from the overtime provisions by Section 13(a)(1) of the Act, 29 U.S.C. 213(a)(1), because they were "outside salesmen" as that term is defined by the Secretary. See 29 C.F.R. 541.500 (Pet. App. 30A). The district court ruled that the employees were "outside salesmen" (Pet. App. 17A-28A). The court of appeals reversed (Pet. App. 1A-16A).

1. *Petitioner's Sales and Distribution System.* Petitioner is a franchised bottler and distributor of Royal Crown Cola products, supplying chain stores, inde-

pendent stores and vending machine locations in the Akron, Ohio area (Pet. App. 18A-19A). The employees in question are routemen who deliver the products and perform other services at the retail outlets.

Approximately 60 percent of petitioner's business is derived from chain store accounts.[1] These accounts are initially obtained by petitioner's sales manager or route manager by personal contact at the chain central offices (Pet. App. 19A, 23A; App. 46, 51-52, 81, 87-88, 90, 91, 94-95, 99, 107-111, 147-148, 151-159, 292-295).[2] If the chain decides to carry Royal Crown Cola products, the central office notifies its stores, usually by letters or bulletins, that it has authorized the stocking of particular products at stated prices and on specified terms (App. 29, 54-55, 88, 109-110, 128-129, 151-152, 258, 322, 327-328, 333-334, 336-338).[3]

The individual chain stores allocate shelf or cooler space to the various beverage bottlers (Pet. App. 23A). These allocations are made by the store managers and

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[1] Both the court of appeals and the district court concentrated discussion on sales and deliveries to chain stores because they comprised the major part of petitioner's business and the routemen's work (Pet. App. 5A, 19A).

[2] "App." refers to the Appendix in the court of appeals.

[3] Chain stores are not permitted to sell unauthorized items (App. 29, 266-267, 271-272, 280, 293-294, 321, 326, 327, 334, 337). Petitioner's officials must obtain authorization from the central office to deliver new products, packaging and container sizes to established accounts (App. 29, 54-55, 88, 109-110, 128-129, 153-154, 174-175, 258-259) and for participation by the chain stores in special "promotion[s]" which petitioner occasionally conducts (Pet. App. 23A; App. 54-56, 75, 76, 87-88, 97-98, 109-110, 153-156, 178, 229-230, 267, 268, 282-283, 289-290, 294-295, 303).

other chain personnel (App. 258, 263-265, 268-270, 273-278, 300-303). The beverage companies then are notified to deliver on a specified date (App. 258-259, 265, 277-278, 286).[4]

The routeman's primary function is to deliver a sufficient amount of stock to fill petitioner's allotted space in the chain store. He ascertains the amount required by examining the shelves; brings the proper amount into the store, sometimes actually stocking the shelves; carries away empty bottles; and presents an invoice for the amount delivered, with credit for the returned empty bottles (App. 228-229, 237-239, 244-245, 248-249, 251-252, 286-288, 291-292, 301-302, 305-306, 309).[5] Routemen are paid a weekly base rate of $32.00, plus specified amounts for each case of beverage delivered and each case of empty bottles returned.

2. *The Proceeding Below.* The district court ruled that the routemen are outside salesmen who are exempt from the Act's overtime provisions under Section 13(a)(1) (Pet. App. 29A). The court acknowledged that required authorizations for purchase of petitioner's products or promotional activities are obtained

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[4] The store manager may reallocate space in response to consumer demand, with or without the approval of the central office, depending on chain policy (App. 250-251, 261-263, 265, 273, 278, 286, 295-296, 301-303, 309-310).

[5] Cash collections are not permitted in the chain stores. Rather, the manager, assistant manager or beverage clerk signs the invoice presented by the driver (App. 251-252, 286-287, 301-302, 310-311), and payment is made by the chain central office on a periodic basis, agreed upon by the chain representatives and petitioner's sales manager (App. 111-112, 331-332, 334).

exclusively by its sales managers or route managers (Pet. App. 23A), but it stressed that these authorizations do not designate the quantities to be purchased and that the routemen participated in the initial allocation of shelf and cooler space in the stores "[a]t times" (*ibid.*). The court also noted other sales functions of the routemen such as persuading stores to increase the space originally allocated to petitioner's products (Pet. App. 24A) and soliciting new accounts (Pet. App. 27A). The court further found that the amount of the routemen's time spent servicing vending machines did "not even approach the twenty percent limitation on nonexempt work" (Pet. App. 28A).[6]

The court of appeals unanimously reversed. It held that the district court's finding that the routemen were exempt "outside salesmen" was clearly erroneous because petitioner had not met its burden of showing, "by plain and unmistakable evidence," that "each employee is entitled to the exemption" (Pet. App. 12A). The court ruled that there had not been an adequate showing that sales functions performed by the routemen were sufficiently regular or frequent to justify classifying them as "outside salesmen" under the applicable regulations (Pet. App. 14A-15A). None of the other activities or factors on which the district court relied, the court held, altered the fact that the basic

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[6] Regulations defining "outside salesman" require that their nonsales activity "not exceed 20 percent of the hours worked in the workweek by nonexempt employees of the employer" (29 C.F.R. 541.500).

function of the routeman is not that of a salesman but a deliveryman who regularly delivers products "in amounts determined in the first instance by the customer at locations usually first obtained by [petitioner's] management employees" (Pet. App. 16A).

ARGUMENT

The petition raises primarily factual issues which do not warrant plenary review by this Court. The decision of the court of appeals was, in any event, correct.

Exemptions from the Fair Labor Standards Act are "narrowly construed against the employers seeking to assert them" and applied only in cases "plainly and unmistakably within their terms and spirit." *Arnold* v. *Ben Kanowsky, Inc.*, 361 U.S. 388, 392; *Phillips Co.* v. *Walling*, 324 U.S. 490, 493. Moreover, as the court of appeals pointed out, the exemptions provided by Section 13(a)(1) apply on an individual, not a class, basis (Pet. App. 12A, 15A). See *Mitchell* v. *Williams*, 420 F. 2d 67, 69 (C.A. 8); *Triple "AAA" Company* v. *Wirtz*, 378 F. 2d 884, 887 (C.A. 10), certiorari denied, 389 U.S. 959; *Mitchell* v. *Trade Winds Co.*, 289 F. 2d 278, 282 (C.A. 5), certiorari denied, 328 U.S. 866. Under settled principles, therefore, petitioner was required to prove "plainly and unmistakably" that each of the routemen for whom it claimed the exemption was an "outside salesman" as defined in the applicable regulation. The court of appeals correctly held that the district court's ruling that petitioner had met this burden was clearly erroneous.

The regulation defines "outside salesman" as one who is "customarily and regularly" engaged in "[m]aking sales" or "[o]btaining orders or contracts" and who does not spend more than 20 percent of a normal workweek—eight hours in this case—in employment activities unrelated to such selling functions. 29 C.F.R. 541.500. In short, an outside salesman is one whose "chief duty or primary function" is selling, not the performance of "service and delivery duties." 29 C.F.R. 541.505(a). The principal activities of petitioner's routemen are in the latter category. There is no dispute that routemen occasionally perform some sales functions. On this record, however, petitioner's evidence—with respect to activities of the class and not individuals—was simply insufficient to show that sales activity was so frequent and regular that it was in fact the chief duty or primary function of the routemen.

The district court misinterpreted the significance of the fact that the specific amounts of products are determined by the routeman at the store rather than at the time the general contract with the chain is negotiated. The essentials of the selling are done at the central office level by the sales manager or the route manager; all terms and conditions of sale except the specific quantities are agreed upon at that time (App. 154, 156-159, 258, 272, 320, 322, 328, 333-334, 336, 338). It is true that the chains only authorize and do not require member stores to carry petitioner's authorized products. But the stores may not substitute the unauthorized products of a competitor, and, as a practical mat-

ter, almost invariably accept all authorized products.[7] Routemen do not, moreover, perform a significant sales function in connection with store decisions regarding initial allocation or subsequent increases in allocation of space. The record indicates that these decisions are essentially based upon projections of and changes in consumer demand and are not made in response to any sales efforts by the routemen (App. 258, 261, 263-265, 268-270, 273-278, 280-283, 287-289, 310). The routemen merely calculate the proper amount of merchandise for the designated space and supply it. The fact that the routemen are typically the only direct contact of a store (Pet. App. 26A) with petitioner thus does not convert the routemen into salesmen.[8]

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[7] Petitioner's vice-president and general manager admitted that he could recall only three stores which had refused to carry petitioner's products (App. 133). The rare occasion when a routeman might meet resistance from a store manager and attempt to change his mind clearly would not convert him into one whose "chief duty or primary function" is to sell.

[8] The district court's finding that differences in the routemen's annual earnings are attributable to "the disparity in [their] selling ability and initiative" (Pet. App. 26A) is based solely on the unsubstantiated testimony of petitioner's route manager (App. 164-165). This finding ignores not only the fact that some routemen had significantly more chain accounts, and thus more lucrative routes, than others, but also the settled principle that such conclusory statements, unsupported by any probative objective evidence, do not satisfy an employer's burden of establishing the facts requisite to a claimed exemption. *Idaho Metal Works* v. *Wirtz*, 383 U.S. 190, 206, 208-209; *Acme Car & Truck Rentals, Inc.* v. *Hooper*, 331 F.2d 442, 447 (C.A. 5); *Mitchell* v. *City Ice Company*, 273 F.2d 560, 561 (C.A. 5). See, also, *Shultz* v. *Wheaton Glass Company*, 421 F.2d 259, 267 (C.A. 3), certiorari denied, 398 U.S. 905.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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